SIVANESAN v. SHYMALA

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Hashim Yeop A. Sani S.C. JJ.) October 30, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 235 of 1984]

Family Law – Divorce on ground of mutual consent – Procedure to be followed – No necessity to show marriage has broken down – Provision for reference to conciliatory body inapplicable – Terms and conditions to be agreed by petitioners and to be accepted by court as fair and reasonable – Divorce and Matrimonial Causes Rules, 1950, rr. 9 & 15(2) – Law Reform (Marriage and Divorce) Act, 1976, ss. 52, 57 & 106.

In this case the parties had filed a joint petition to have their marriage dissolved. In the petition they merely prayed that the said marriage be dissolved. The petition was supported by two affidavits, one sworn to by the husband and the other jointly. In the joint affidavit they prayed for an order –

a) that the marriage is dissolved by mutual consent;

b) that in consideration of the Petitioner returning her dowry held under Grant 6278 Lot 7314 in the Mukim and Town of Seremban to the Co-Petitioner's father Ganesan s/o Kailasapillai AND the Co-Petitioner returning the property held under H.S. (D) 40194 Lot 4740 District of Sungei Buloh, Selangor to the Petitioner the Co-Petitioner hereby accepts this settlement of her matrimonial assets and all her future claims for maintenance; and

c) no order as to costs.

The learned trial judge granted the divorce and made a decree nisi and then adjourned the hearing to deal with the matter of exchange of property in Chambers. Before the decree nisi could be made absolute, the husband died. The appellant appealed.

Held: (1) the court should only dissolve the marriage by mutual consent upon such terms and subject to such conditions as agreed by the joint petitioners and accepted by the court as fair and reasonable. What the learned judge should have done was to adjourn the hearing to chambers and clear the confusion surrounding the exchange of properties. Once this has been settled the learned judge could then adjourn the matter to open court and grant an adjournment to enable the spouses to file an amended joint petition incorporating the new agreed terms. Until the terms and conditions are settled and agreed to in the joint petition or amended joint petition the court should never grant a decree of divorce by mutual consent which is completely different from other forms of divorce;

(2) it is not necessary for the joint petitioners in an application for mutual divorce to state that their marriage has irretrievably broken down. Neither is there any requirement to make a statement that efforts at reconciliation have not been successful;

(3) the appeal must be allowed and the decree *nisi* set aside.

Cases referred to:

(1) *Suci Mathews* v. *Thomas Mathews* [1985] 2 M.L.J. 228.

(2) *In re Divorce Petitions Nos. 18, 20 and 24 of 1983* [1984] 2 M.L.J. 158.

(3) *Sim Kim Ong* v. *Goh Phaik Sooi* [1976] 1 M.L.J. 232.

(4) *Wong Chu Ming* v. *Kho Lieng Hiong* [1952] S.C.R. 1.

(5) *Santos* v. *Santos* [1972] 2 All E.R. 246; [1972] Fam. 247.

SUPREME COURT.

C.H. Liew for the appellant.
G. Joseph for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): We allowed the appeal and set aside the decree *nisi*. We stated that we would give our reasons later and we do so now. The appeal is concerned with the dissolution of marriage on ground of mutual consent under section 52 of the Law Reform (Marriage and Divorce) Act, 1976 (hereinafter referred to as "the Act"). The section provides:

"52. If husband and wife mutually agree that their marriage should be dissolved they may after the expiration of two years from the date of their marriage present a joint petition accordingly and the court may, if it thinks fit, make a decree of divorce on being satisfied that both parties freely consent, and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of divorce as it thinks fit."

Sivanesan, the petitioner (husband) and Shyamala, the co-petitioner (wife) were married on August 24, 1974 at the Petaling Jaya Marriage Registry. While the husband lived in Petaling Jaya the wife lived in Klang. They have no children. On May 25, 1984 they filed a joint petition freely consenting mutually to have their marriage dissolved. In the petition they merely pray that the said marriage be dissolved.

The petition was supported by two affidavits, one sworn to by the husband on May 25, 1984 and the other by them jointly on August 24, 1984. The second affidavit was supposed to clarify the first affidavit. Instead, it creates confusion as to the precise provision to be made for the wife. For this the solicitors must share some blame. Going back to the first affidavit the husband declared his properties to comprise three houses and one piece of land and that the land was given to him as a dowry at the time of marriage and that he undertook to transfer it back to his father-in-law. In the second affidavit they explained how the

three houses came to be owned by the husband. Two of the houses were given to the wife by her father. One was registered in her name and the other in the husband's name. Later, she transferred the house to her husband. The third house was bought by the wife but registered in her husband's name. As to the piece of land it was given to the wife by her father as dowry and apparently registered in her husband's name also. So at the time they petitioned for mutual divorce all the properties were registered in the husband's name. They agreed that in consideration of the wife returning the house originally given by her father, the husband would return the piece of land he had received as dowry to his father-in-law. The wife accepted this exchange in full and final settlement of all her claims in respect of maintenance or any matrimonial assets. So by paragraph 6 of the joint affidavit they pray for an order:

"(a) that the marriage be dissolved by mutual consent;

(b) that in consideration of the Petitioner returning her dowry held under Grant 6278 Lot 7314 in the Mukim and Town of Seremban to the Co-Petitioner's father Ganesan s/o Kailasapillai AND the Co-Petitioner returning the property held under H.S.(D) 40194 Lot 4740 District of Sungei Buloh, Selangor to the Petitioner, the Co-Petitioner hereby accepts this settlement of her matrimonial assets and all her future claims for maintenance; and

(c) no order as to costs."

The learned Judge was clearly satisfied that the conditions for the dissolution of marriage by mutual consent under section 52 had been complied with. However, he was clearly confused by prayer (b) above relating to the exchange of property. The substance in prayer (b) should have formed another paragraph in the joint affidavit as a mere statement. Bearing in mind that all the properties were registered in the husband's name prayer (b) need only state "that the Petitioner shall transfer the property held under Grant 6278 Lot 7314 in the Mukim of and Town of Seremban to the Co-Petitioner's father Ganesan s/o Kailasapillai as soon as possible." Until the transfer is completed the court should not make the decree absolute.

The learned Judge very properly commented that they had failed to set down in the usual manner in the body of the joint petition the particulars with regard to the proper provision to be made to the wife and had also omitted to incorporate therein a prayer therefor in the normal manner. They could have applied to amend the petition at the hearing as no leave is necessary since the petition is not meant to be served on any person. Rule 15(2) of the Divorce and Matrimonial Rules, 1980 (hereinafter referred to as "the Rules") is clear and provides that:

"A petition may be amended without leave before it is served but only with leave after it has been served."

What went wrong, in our view, is that the learned Judge made an order dissolving the marriage before resolving the exact term or condition for the mutual divorce. He granted the divorce, then adjourned the hearing to deal with the matter of exchange of property in chambers. No children were involved in this case. The only matter the court had to be satisfied with was the proper provision to be made for the wife. Until the term or condition of proper provision to be made for the wife had been settled and could form part of the decree the court should never grant a decree. The terms or conditions must be embodied in the order for the dissolution of marriage by mutual consent. The court may also attach other terms or conditions it deems fit.

The point we would like to stress is that the court should only dissolve the marriage by mutual consent upon such terms and subject to such conditions as agreed by the joint petitioners and accepted by the court as fair and reasonable. What the learned Judge should have done was to adjourn the hearing to chambers and clear the confusion surrounding the exchange of properties. Once this has been settled the learned Judge could then adjourn the matter to open court and grant an adjournment to enable the spouses to file an amended joint petition incorporating the new agreed terms and conditions. In other words, until the terms and conditions are settled and agreed to in the joint petition or amended joint petition the court should never grant a decree of divorce by mutual consent which is completely different from other forms of divorce. In this case the learned Judge granted a decree *nisi* of mutual divorce without first satisfying himself that proper provision in the form of division of communal property has been made for the wife petitioner. We were informed by counsel that the husband had passed away before the decree could be made absolute. If the decree including the term or condition was made absolute then the wife would have no claim to her former husband's remaining properties which would go to his estate. As he died before the decree could be made absolute, there would in effect be no divorce and the wife being a widow is entitled to claim for the properties. An interesting case to read is *Suci Mathews* v. *Thomas Mathews.*[1]

Mutual divorce is something new in Peninsular Malaysia and Sabah. There is bound to be uncertainties and teething trouble in implementing the provisions of section 52. But this is not new to Sarawak where the law relating to mutual divorce has been in existence since 1932. After dealing with section 6 of the Sarawak Matrimonial Causes Ordinance the Report of the Royal Commission on Non-Muslim Marriage and Divorce Laws continues at page 16 with this statement:

"Section 7 provides that a joint petition may be presented by both spouses if they mutually agree to a dissolution of their marriage and that 'the court may, if it thinks fit, dissolve such marriage on being satisfied that both parties freely consent and that proper provision is made for the wife and for the support, care and custody of the children, if any, of the marriage, and may attach such conditions to the decree of dissolution as it may deem fit."

The Chief Justice (Borneo), then a Judge, had the privilege of being consulted by the Chairman of the Royal Commission, the late Tan Sri H.T. Ong, then Chief Justice (Malaya) on few occasions on matters pertaining to working of mutual divorce in Sarawak. It is therefore not surprising that the Report at the same page makes the following observations:

"The result of importing the essential features of sections 6 and 7 of the Sarawak Ordinance will be greatly to simplify the law. The proposed reform will eliminate the vexing problems of condonation and its revival, as well as encourage resumption or continuance of cohabitation, free of all restrictions, with a view to reconciliation. These artificial bars to relief, in the opinion of the Commission, serve no useful purpose and deserve to be jettisoned without any regrets. Divorce by mutual consent makes collusion irrelevant.

The Commission would especially stress the vital importance of paragraph (e), safeguarding the interests of the respondent and children of the marriage. Until the Court is satisfied that the financial arrangements are fair and reasonable, or the best that can be made in the circumstances, the Court should not make a decree."

Paragraph (e) is one of the recommendations of the Royal Commission and reads as follows:

"(e) that before making a decree the Court shall take into consideration the interests of the child or children of the marriage and of either party likely to be adversely affected thereby and that upon granting a decree, the Court do so upon such terms and subject to such conditions as it deems fit and just to both parties."

Our attention was drawn to the case of *In Re Divorce Petitions Nos. 18, 20 and 24 of 1983*[2] where the petitioners for mutual divorce followed Form 3 as prescribed by "the Rules". In answering the common question of law whether the mere mutual consent of the petitioners to the dissolution of a marriage is the sole criterion for the grant of the decree *nisi* the learned Judge had been very critical of the ease in obtaining mutual divorce. He has made many suggestions. Some are very constructive and worthy of support. However, there are others which are doubtful and should not be allowed to stand and create confusion. He complained that in many cases the petitioners do not bother to come to court. Our answer is that petitioners must appear in court for the court may wish to satisfy itself by questioning them as to whether they freely consent to the dissolution of their marriage and whether the provision for the wife and for the support, care and custody of the children, if any, are fair and reasonable. It may, after questioning, even attach other conditions if it thinks fit.

The learned Judge mentioned that the joint petition need not have to be signed by the petitioners themselves if solicitors represented them. This is a requirement under rule 9 of "the Rules". We agree that there should be a joint affidavit in support of the petition. This is the practice in Sarawak since the extension of "the Act". He was worried that the court might be prevented from imposing a cooling-off period in respect of mutual divorce. In our opinion, having regard to the express exception contained in section 106 of "the Act", and the provision that two years must elapse before the spouses can file a joint petition to dissolve their marriage, the concern of the learned Judge seems misplaced.

At page 163 the learned Judge observed:

"These forms are generally models which are to be used *mutatis mutandis* as the circumstances of the case require ...".

With respect, we agree with this observation. However, he went on to say that:

"To comply with section 57(1)(d) and (2) I hold that it would suffice if a concise statement is made in the joint petition to the effect that the marriage has irretrievably broken down and that both parties mutually agree that the marriage should be dissolved. A statement is also required in the petition as to the steps taken to effect a reconciliation."

A perusal of "the Act" shows at once that irretrievable breakdown of marriage may be one of the main grounds for divorce but it is certainly not the sole ground whatever the marginal note may say. Sections 51 and 52 are clear. Section 51 states in no uncertain terms that where one party

to a marriage has converted to Islam, the other party who has not so converted may petition for divorce. Dissolution of marriage by mutual consent is another ground. This is covered by section 52 already set out in full earlier on. In proving irretrievable breakdown the court is entitled to look into one or more of the facts set out in section 54. Mutual divorce may be resorted to on one or more grounds, such as, adultery, desertion, cruelty, incompatibility, impotence and so forth. It is possible that the marriage has irretrievably broken down. It is possible that efforts to bring the spouses together have not been successful so that reconciliation is not possible. When the learned Judge referred to section 57 he should appreciate that a divorce can either be contested or undefended. In our view section 57 is meant to cover the case of a contested divorce where a petitioner will have to prove his or her case. In a mutual divorce there is no contest. It belongs to the class of undefended divorce. Therefore, the joint petitioners do not have to prove anything obviating the necessity of testifying to all the sordid or embarrassing story of their married life. We think it is wrong to treat mutual divorce, which is unknown to English law, as if it is a contested divorce as understood in English law.

The learned Judge also mentioned the special procedure introduced in England in 1973 with the object of making divorce simpler and cheaper. He said the special procedure had resulted in a spiralling of divorce rate in England and he feared we might be going in the same direction. We appreciate his concern but we have so far no evidence to indicate that any increase in the rate of divorce in this country is solely caused by the incidence of mutual divorce. We have, however, evidence of backlog of cases in our courts. This phenomenon is also experienced in many common law jurisdiction. It is, therefore, not surprising for any court to find means of reducing this backlog of cases. If the procedure adopted for the grant of mutual divorce will help in clearing the backlog and obviate delay and allow the court to use the time so saved to deal with other more pressing matters we see no reason to complain.

Again, at page 163 of his judgment, the learned Judge stated:

"On a reasonable construction of the language of the Act I hold that mere mutual consent by the spouses to a decree of dissolution does not of itself entitle them to a divorce. Such mutual consent cannot of itself oust the jurisdiction of the courts to enquire into, if it thinks fit, and decide whether in all the circumstances it is just and reasonable that the decree should be made. In my view irretrievable breakdown of a marriage is still the sole ground for a divorce, under the Act."

When *Sim Kim Ong* v. *Goh Phaik Sooi*[3] was decided "the Act" had not as yet been extended to Sarawak. The Federal Court was then dealing with the provisions of the Sarawak Matrimonial Causes Ordinance. Under section 7 of the said Ordinance divorce by mutual consent could only be granted to the spouses if (a) either the marriage was celebrated before a civil authority or (b) neither of the spouses professes Christianity. These features were apparently not accepted by the Commission. Section 52 of "the Act" throws open the door even to Christian marriages. This will undoubtedly increase the incidence of mutual divorce. For this reason the learned Judge was right to express his fear of the spiralling of divorce rate that might follow the open door policy. However, unlike the Sarawak provision, "the Act" imposes a period of two years before the spouses could apply for a decree of divorce by mutual consent. This, in a way, neutralises the ease by which mutual divorce could be obtained. But, it must be pointed out that members of the said Royal Commission were fully aware of the Sarawak law relating to the grant of mutual divorce and recommended acceptance of its essential features. It seems that the said Report has also been referred to the learned Judge. With respect, we are unable to agree with the view of the learned Judge that in a mutual divorce the joint petitioners must state that their marriage has irretrievably broken down. Nothing in "the Act" has expressly required the petitioners under section 52 to make the statement as suggested by the learned Judge. Neither is there any requirement to make a statement that efforts at reconciliation have not been successful. We must point out that these are not matters which the spouses have to prove in a mutual divorce. However, there is nothing to stop the spouses from making such statements if they so wish. But the court should not insist that such statements be stated in the joint petition. The whole rationale is to avoid making public sordid or embarrassing details of their married life which would certainly be the case if the suit is bitterly contested. Mutual divorce had been granted on the ground that the marriage was a mistake and the discretion rested with the court. See *Wong Chu Ming* v. *Kho Lieng Hiong*.[4] Admittedly, this is a Sarawak case and not binding as a decree could theoretically be granted soon after a marriage. But the case is instructive to show that the marriage has irretrievably broken down was never the sole ground in

mutual divorce. If the essential features of the law relating to mutual divorce were imported to Peninsular Malaysia the inference is that the marriage has irretrievably broken down cannot be regarded as the sole ground for the grant of a decree for the dissolution of marriage by mutual consent. In that case Bladgen J. stated in his short judgment at page 2:

"The situation has now however been rectified by the submission of this present petition which discloses that the parties are asking for divorce a bare 6 weeks after they were married. Marriage by whatever custom or creed it is celebrated, is a sacred union. It must not be thought that the Court will automatically grant relief at the whim and pleasure of couples who find after a few weeks of living together that their union is not quite the bed of roses they expected it to be. The Court has a discretion in the granting of a decree and morever can make that grant conditional. I have considered the advisability of granting only a decree nisi in this case so that the parties will have some opportunity of contemplating the rather undignified situation into which they have got themselves. However, I am satisfied that this marriage was a mistake from the very beginning and bearing in mind the youth of the parties – if they were Europeans they would be minors – and the fact that the wife is showing good enough sense to return to her parents I feel that no useful purpose would be served by prolonging their misconceived union any longer. Marriage dissolved."

Parliament must be presumed to have accepted the recommendation of the said Royal Commission on the dissolution of marriage by mutual consent otherwise "the Act" would not have become law. We are not concerned with morals. We may not even agree in our personal capacity with mutual divorce in the same way as we may not agree with the death penalties imposed for drug offences under the Dangerous Drugs Act and for internal security offences under the Internal Security Act. But, our duty is clear. It is to implement the law.

"The Act" also applies to Sarawak. Before the extension of "the Act" the practice in Sarawak was for the spouses to sign their joint petition before a magistrate who would see to it that the provisions of the Matrimonial Causes Ordinance were complied with. There was an occasion when a magistrate refused to sign the petition when one of the spouses was domiciled and resident in the United Kingdom. The spouses must appear personally before the magistrate to sign the petition. The spouses must state their domicile in the petition. The spouses then filed the joint petition in the High Court in the usual manner. It was not uncommon for the learned Judge to postpone the hearing for a cooling-off period of three to six months to see if the spouses would change their minds. Presumably this was due to the fact that there was no time limit for the presentation of the joint petition. In most cases, when the learned Judge granted a decree for mutual divorce he would make it absolute. All the terms or conditions would have to be agreed and clearly set out in the decree. It was not unusual for the learned Judge to see the spouses and, if legally represented, their solicitors in chambers before the hearing in open court to ascertain that the spouses understood the consequence of the step they took and yet consented freely to the mutual divorce. He would question them to satisfy himself that the provision for the wife and for the support, care and custody of the children, if any, were fair and reasonable. The matter would then be adjourned to open court. The learned Judge would once again satisfy himself that the spouses freely consented to the mutual divorce on the terms and conditions agreed and set out in the petition. Once he was so satisfied he would grant the mutual divorce on the terms or conditions as prayed. There was nothing to prevent the learned Judge from attaching other terms or conditions to the decree if he deemed fit. But usually before he did so he would explain to the spouses and obtain their consent.

We consider that there should be a uniform procedure and practice in the whole country in respect of mutual divorce. In Sabah we understand that the spouses sign the joint petition even though they are legally represented, contrary to rule 9 of "the Rules". In Sarawak the practice is for the joint petition to be supported by separate affidavits or a joint affidavit. This appears also to be the practice in Peninsular Malaysia. Where the joint petition is signed by the solicitors representing the spouses such petition shall be supported by separate affidavits or joint affidavit sworn to by the spouses. In the affidavit the spouses should state their domicile. The validity of a decree of divorce is determined by the law of the parties' domicile. The parties must also state that they freely consent to the mutual divorce and agree to the terms or conditions which are set out clearly and concisely in the joint petition. In making the decree it is not unusual for a Judge to give either spouse reasonable access to the children with liberty to apply. In the case of maintenance he will usually also give liberty to apply. These are matters which the spouses usually accept and give their consent to be included in the decree. Where children are involved it is not unusual for the spouses to attach to the affidavit a statement of arrangements for the children. The statement will contain

particulars of the children concerned, their residence, education, health and financial provision and question of access. If any new term or terms are to be added then the spouses should be allowed to amend the joint petition. The court should disregard any affidavit put in by any party in an attempt to vary any of the terms of the joint petition.

The history of laws in Malaysia is a history of legal pluralism. The development of Malaysian common law involved not merely the adoption of English law but also the exercise of value judgment by the Judiciary. During the colonial period the law applicable also took into consideration the several religions, manners and usages of the various communities living in the country. The personal laws were the consequence of the general ethical concern by means of which the principles of English law were circumscribed by the realities of local conditions. In the course of time through the process of interpretation of the law by the Judges progressive restriction on the operation of the customs of these people was achieved. At the same time a body of statute law was growing up which was further to restrict these customs. In this way the legal system had allowed selective parts of the personal laws to be admitted and accepted. This selective application had produced a curious artificiality and rigidity to some areas of obligation notably family and property matters. Today, the country is trying to create national unity. With the result, the scope of personal laws must be further restricted. The reform of the marriage and divorce law is an example of this trend. Mutual divorce has now been accepted and forms part of the laws of Malaysia. Section 47 which enjoins the court "to act and give relief on principles which in the opinion of the court are, as nearly as may be, conformable to the principles on which the High Court of Justice in England acts and gives relief in matrimonial proceedings" clearly can have no application on section 52 as dissolution of marriage by mutual consent is unknown to English law. We agree, with respect, with Shankar J. that the case of *Santos* v. *Santos*[5] cannot apply to a joint petition under section 52 of the Act. We must build up our own law on this matter.

We have expressed our view that section 57 does not apply to a joint petition under section 52 of the Act. So, there is no point contrasting section 57 and section 106 which expressly excludes section 52 of its ambit. It is only necessary to set out section 106(1) which reads:

> "No person shall petition for divorce, except under sections 51 and 52, unless he or she shall have first referred the matrimonial difficulty to a conciliatory body and that body has certified that it has failed to reconcile the parties ..."

In so far as mutual divorce is concerned, in the experience of at least two members of this Court, most cases of this nature invariably came to court as a last resort. Usually, parents, relatives and friends would do their best to effect a reconciliation between the spouses.

The appeal before us illustrates the practical difficulty of incorporating into the form and procedure the English law principles which have no relation to the concept of divorce by mutual consent. The difficulty was further compounded by an insistence upon the application of technical rules of English law. We must ever be cautious to strike a path between excessive rigidity and excessive vacuity in our deliberation.

Appeal allowed.

Solicitors: *C.H. Liew & Co.; Lawrence & Joseph Mahalingam & Co.*

ONG YAN & ANOR. v. COLLECTOR OF LAND REVENUE, ALOR GAJAH, MALACCA

[A.C.J. (Wan Yahya J.) June 7, 1985]

[Malacca – Land Reference No. 11 of 1982]

Land Acquisition – Objection to amount of compensation – Below market value – Mere opinions – Comparative sales – Principles of valuation – Land Acquisition Act, 1960, ss. 8 & 38.

In this land reference under s. 38 of the Land Acquisition Act, 1960, the acquired land is a freehold rubber plantation about 13 acres and 9 poles in area in the Mukim of Masjid Tanah, Malacca. It is a second layer lot located off the 19 milestone Masjid Tanah/Lubok China Road. The relevant date for valuation purposes is August 30, 1979 when section 8 notification was gazetted. The question for determination is the amount of compensation. The reason advanced by the applicant is based on the compensation being lower than the market value of the acquired land at the relevant time. His case rests heavily on his opinion and that of a licensed appraiser. The respondent's case is based on values of comparative sales.

Held: (1) in land acquisition case the burden is on the applicant to make out a *prima facie* case of inadequate award. Only when he succeeds in doing so would the res-